Supreme Court, U.S.
FILED
JUN 26 1970

in the

Supreme Court

of the

United States

October Term, 1969

No. 1,752 320

MAURICE H. SCHY,

Petitioner,

vs.

THE SUSQUEHANNA CORPORATION, a Delaware corporation, SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSEN, D. W. REEVES, R. C. SCHENK and N. F. TISDALE, JR.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAURICE H. SCHY
9225 Collins Avenue
Surfside, Florida 33154
Petitioner pro se.

MIAMI REVIEW — 371-4853 — 377-3721

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APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1969 September Session, 1969

No. 17,393

MAURICE H. SCHY,

Appellant,

v.

The Susquehanna Corporation, a Delaware corporation, SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSEN, D. W. REEVES, R. C. SCHENK and N. F. TISDALE, JR.,

Appellees.

January 5, 1970.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Before KNOCH and CUMMINGS, *Circuit Judges*, and GORDON, *District Judge*.

GORDON, *District Judge*.[1] This action was brought

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[1]The writer of this opinion is sitting by designation from the district court for the Eastern District of Wisconsin.

for equitable relief from an alleged violation of §14(a) of the Securities and Exchange Act, 15 U.S.C. §78n, and the applicable regulation. The district court dismissed the complaint with prejudice and denied leave for the plaintiff to file an amended complaint.

The plaintiff is one of 9,145 stockholders of the Susquehanna Corporation. In his complaint, he has alleged that Susquehanna issued a false and misleading proxy statement on March 29, 1967. The purpose of that statement was to obtain stockholder approval of a proposed new issue of Susquehanna preferred stock. The plaintiff claimed that Susquehanna failed in the proxy statement of March 29 to inform stockholders of a planned merger with Atlantic Research Corporation and of the intended use of the new preferred stock to carry out such merger.

Although a majority of the shares outstanding were voted to approve the new stock issue, no preferred shares were issued pursuant to the proxy statement of March 29. On August 2, 1967, the board of directors of Susquehanna approved a merger with Atlantic Research Corporation; on October 18, 1967, the plaintiff filed his complaint.

On October 26, 1967, Susquehanna and Atlantic issued a joint proxy statement. Like Susquehanna's proxy statement of March 29, this joint proxy statement also sought authorization for a new issue of preferred stock. The proxy statement also outlined the stock's contemplated use in effectuating the merger of the two companies, and it fully described the terms of the proposed new issue of the stock and of the merger. It further described, in ample detail, the plaintiff's pending law suit. At the oral argument of this appeal, the plaintiff's counsel acknowl-

edged that the joint proxy statement was accurate and complete. On November 27, 1967, the stockholders approved the plan described in the joint proxy statement dated October 26 by a vote of 80.8% to 0.42%.

The plaintiff filed a motion for summary judgment which he thereafter withdrew but later renewed. The defendants also filed a motion in which they applied for an order that the plaintiff could not maintain his action as a class action and also to dismiss on the ground that the plaintiff had failed to seek redress from the stockholders before instituting his action.

Following a hearing on the defendant's motion, the district judge rendered an oral opinion granting such motion on the grounds stated in the motion and on the additional ground, raised at the oral argument, that the plaintiff, as a matter of law, was unable to show any damage resulting from the alleged fraudulent proxy statement. Later, a judgment was entered dismissing the action on the merits.

The plaintiff owns 100 shares of Susquehanna stock. He is an attorney and has aided in preparation of this suit. He has an arrangement with his attorneys whereby he will share in the attorneys' fees should he prevail in the action.

I. PROBLEMS OF MOTION PRACTICE

The plaintiff contends that the defendants' motion could not be construed as a motion under rule 12(b)(6) to dismiss for failure to state a claim upon which relief can be granted. For that reason, he argues, the motion could not be treated as a motion for summary judgment under rule 12(b). We reject this contention.

The defendants' motion charged that the plaintiff's suit was premature for failure to seek redress within the corporation. Prematurity may be raised on a motion to dismiss under rule 12(b) (6), but a dismissal granted upon this ground alone must be without prejudice. *Tademy v. Scott et al*, 157 F.2d 826, 828 (5th Cir. 1946); *Van Horn v. State Farm Mutual Automobile Insurance Co.*, 283 F. Supp. 260, 261 (E.D. Mich. 1966), affirmed 391 F.2d 910.

In addition, a motion to dismiss based upon a lack of damages, may properly be treated as a motion to dismiss under rule 12(b) (6). In *Premier Malt Products Co. v. Kasser*, 23 F.2d 98, 99 (E.D.Pa. 1927), the court observed:

> "There must be both the injuria and the damnum to give a legal cause of action, and this remains true notwithstanding the legal fiction of nominal damages. Indeed, this truth made the legal fiction logically necessary."

Accord, *Citrin v. Greater New York Industries*, 79 F. Supp. 692, 694-5 (S.D.N.Y. 1948); *Package Closure Corporation v. Scalright Co.*, 4 F.R.D. 114, 116 (S.D.N.Y. 1943). The plaintiff states that defendants were not entitled to raise the question of damages at the hearing on their motion. The matter of damages would appear to have been improperly raised at the hearing as a ground for dismissal since the defendants had not mentioned it in their notice of motion. See *McNichols v. Lennox Furnace Co.*, 7 F.R.D. 40, 42-3 (N.D.N.Y. 1947). However, the plaintiff fully argued this ground at the hearing and cannot complain here that the district court considered it. *DeLorenzo v. Federal Deposit Insurance Corporation*, 268 F.Supp. 378, 381 (S.D.N.Y. 1967); *Interlego, A. G. v. Leslie-Henry Co.*, 214 F.Supp. 238, 240 (M.D. Pa. 1963).

The plaintiff also contends that even if properly construed as a motion to dismiss under rule 12(b)(6), the defendants' motion may not be treated as a motion for summary judgment since it was made after the answer had been filed. This argument is without merit. A motion to dismiss made after the filing of an answer serves the same function as a motion for judgment on the pleadings and may be regarded as one. *United States for Use of E. E. Black Limited v. Price-McNemar Construction Co.*, 320 F.2d 663, 664 n. 1 (9th Cir. 1963); *Kenemer v. Arkansas Fuel Oil Co.*, 151 F.2d 567, 568 (5th Cir. 1945). Cf. *In re Union National Bank & Trust Co. of Souderton, Pa.*, 287 F. Supp. 431, 433 (E.D. Pa. 1968). Rule 12(c) concerns motions "after the pleadings are closed" and specifically provides that a motion for judgment on the pleadings filed with supporting affidavits may be treated as a motion for summary judgment.

The plaintiff next complains that the district court erroneously considered affidavits and exhibits filed on the day of the hearing in violation of rule 6(d), Federal Rules of Civil Procedure. The plaintiff did not complain of untimeliness in the trial court, although he did urge the court not to consider the exhibits as evidence. Since the plaintiff did not complain about the late filing in the trial court, he cannot do so on appeal.

The plaintiff further contends that the district court should not have considered the October 26, 1967 proxy statement in rendering its decision. He argues that the copy filed in support of the defendants' motion did not comply with the requirements of rule 56(e) and, thus, did not constitute a sufficient affidavit. We reject the plaintiff's contention. The plaintiff has admitted that the Octo-

ber 26, 1967 proxy statement is complete and accurate; he does not deny that the copy submitted with the motion is an accurate copy of the October 26, 1967 proxy statement. An officer of Susquehanna in a separate affidavit identified the attached proxy statement. In *Pollack v. City of Newark, N. J.*, 147 F.Supp. 35, 39 (D. N.J. 1956), affirmed 248 F.2d 543, certiorari denied 355 U.S. 964, the district court said:

> "Moreover in considering a motion for summary judgment, the court is entitled to consider exhibits and other papers that have been identified by affidavit or otherwise made admissible in evidence."

See *Barker v. Summey*, 185 F. Supp. 298 (N.D. Ind. 1960); *Hartford Accident and Indemnity Co. v. Flanagan*, 28 F. Supp. 415 (S.D. Ohio 1939).

Finally, the plaintiff urges that the district court should not have made a determination under rule 23(c), Federal Rules of Civil Procedure, as to whether the plaintiff could maintain his suit as a class action without having first given notice to members of the class that the court planned to make such a determination.

The Committee Note of 1966, quoted in 3B, *Moore's Federal Practice*, ¶23.01[11.-1], page 23-32, states:

> "Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d)(2)."

In our opinion, the trial court did not abuse its discretion by refusing to order that notice be given of its intention to make a determination when every member of the class has already received a proxy statement containing a full, accurate and complete description of the pending action. Cf. *Snyder v. Board of Trustees of the University of Illinois*, 286 F. Supp. 927, 931 (N.D. Ill. 1968).

In conclusion, we hold that the procedure followed by the district court in granting summary judgment did not involve reversible error. We will now consider the propriety of the substantive rulings.

II. MAINTENANCE OF CLASS ACTION.

The plaintiff contends that he could properly represent the class. We disagree and hold that the district court correctly found that this action could not be maintained as a class action.

In determining the adequacy of representation, the district court is not confined to the specific procedure outlined by rule 23. It was proper to consider the additional circumstances and facts of the case. After being fully informed of the nature of the plaintiff's pending suit, 80.8% of the stockholders voted in favor of the proposal made in the October 26, 1967 proxy statement, thereby approving the issuance of preferred stock for use in effectuating the merger. Only 0.42% voted against it. Since over eighty percent of the class voted in favor of the proposal of which the plaintiff's suit complains, and they did so with full knowledge of the plaintiff's suit, it is somewhat difficult for the plaintiff to claim that he represents the class.

The plaintiff cannot maintain his action as a class suit when his interests are antagonistic to the interests of the persons he purports to represent. *Hansberry* v. *Lee*, 311 U.S. 32, 44-5 (1940); *Carroll* v. *American Federation of Musicians of U.S. and Can.*, 372 F.2d 155, 162 (2d Cir. 1967), judgment vacated on other grounds, 391 U.S. 99 (1968); *Troup* v. *McCart*, 238 F.2d 289, 294 (5th Cir. 1956).

III. CAUSATION

The defendants maintain that the district court found that the October 26, 1967 proxy statement broke the chain of causation between the earlier proxy statement and any damage allegedly caused by it. The plaintiff denies that this issue was raised in the district court and objects to considering it on this appeal; he insists that causation is a fact issue which must be settled by a trial.

Since this issue can be resolved on the basis of affidavits which were filed in the district court and were considered in its decision, it may be raised and settled here. In *Reinstine* v. *Rosenfield*, 111 F.2d 892, 894 (7th Cir. 1940), the court said:

> "From time immemorial Courts of Appeal have been authorized to affirm the rulings of lower courts for any valid reason based upon the evidence, although not assigned."

No shares of preferred stock were ever issued pursuant to the March 29, 1967 proxy. The shares which were issued and used to effectuate the merger were issued in response to the October 26, 1967 proxy, which the plaintiff admits was fair and complete.

Under the foregoing circumstances, we believe the district court correctly held that as a matter of law, no damage was caused by the March 29, 1967 proxy. *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 430-1 (1964) and *Mills* v. *Electric Autolite Company*, 403 F.2d 429, 435-6 (7th Cir. 1968), certiorari granted, 394 U.S. 971, referred to by the plaintiff, are distinguishable in that they involved factual disputes. Compare also *Swanson* v. *American Consumer Industries, Inc.*, 415 F.2d 1326 (7th Cir. 1969). Here there was no influence from the March 29, 1967 proxy statement which was unremedied by the October 26, 1967 proxy statement.

IV. CONCLUSION

Shortly before the beginning of oral argument, counsel for the defendant submitted certain documents to the court with the request that the court consider them in connection with this appeal. Counsel for the plaintiff objected to this offer on the ground that it was not timely made. The court is of the opinion that the objection of the plaintiff is well taken and, accordingly, has not considered such documents in deciding this appeal.

Since we find sufficient grounds to support the judgment of the district court, it is unnecessary to consider certain other lesser errors which the appellant has raised.

The judgment of the district court is affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

CITED STATUTES

SECURITIES ACT OF 1934 (15 U.S.C.A. §78a-78hh-1)

"PROXIES

Sec. 14(a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title."

GENERAL RULES AND REGULATIONS OF THE SECURITIES AND EXCHANGE COMMISSION UNDER THE SECURITIES ACT OF 1934 (17 CFR 240)

"REGULATION 14A

SOLICITATION OF PROXIES

* * *

Rule 14a-8. Proposals of Security Holders.

(a) If any security holder entitled to vote at a meeting of security holders of the issuer shall submit to the management of the issuer, within the time hereinafter

specified, a proposal which is accompanied by notice of his intention to present the proposal for action at the meeting, the management shall set forth the proposal in its proxy statement and shall identify it in its form of proxy and provide means by which security holders can make the specification provided for by Rule 14a-4(b). The management of the issuer shall not be required by this rule to include the proposal in its proxy statement for an annual meeting unless the proposal is submitted to the management not less than 60 days in advance of a day corresponding to the first date on which the management's proxy soliciting material was released to security holders in connection with the last annual meeting of security holders, except that if the date of the annual meeting has been changed as a result of a change in the fiscal year, a proposal shall be submitted a reasonable time before the solicitation is made. A proposal to be presented at any other meeting shall be submitted to the management of the issuer a reasonable time before the solicitation is made. This rule does not apply, however, to elections to office or to counter proposals to matters to be submitted by the management.

(b) If the management opposes the proposal, it shall also, at the request of the security holder, include in its proxy statement a statement of the security holder, in not more than 100 words, in support of the proposal, which statement shall not include the name and address of the security holder. The proxy statement shall also include either the name and address of the security holder or a statement that such information will be furnished by the issuer or by the Commission to any person, orally or in writing as requested, promptly upon the receipt of any oral or written request therefor. If the name and address

of the security holder is omitted from the proxy statement, it shall be furnished to the Commission at the time of filing the management's preliminary proxy material pursuant to Rule 14a-6(a). The statement and request of the security holder shall be furnished to the management at the same time that the proposal is furnished. Neither the management nor the issuer shall be responsible for such statement."

"Rule 14a-9. False or Misleading Statements.

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading."

FEDERAL RULES OF CIVIL PROCEDURE

(28 U.S.C.A.)

"Rule 12. Defenses and Objections — When and How Presented — by Pleadings or Motion — Motion for Judgment on Pleadings.

* * *

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter . . . . (6) failure to state a claim upon which relief can be granted . . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

"Rule 15. Amended and Supplemental Pleadings.

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

* * *

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the Court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor."

"Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if *** (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

"Rule 23.1. Derivative Actions by Shareholders.

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter de-

volved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivation action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs."

"Rule 56. Summary Judgment.

* * *

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * *

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing advidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated herein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits."

APPENDIX "C"

Minute Order of the District Court entered on Nov. 7, 1968, denying plaintiff's motion for leave to file instanter his amended and supplemental complaint (A. 172).

APPENDIX "D"

Order of District Court entered on Nov. 8, 1968, dismissing action as a class action and dismissing action with prejudice and with costs against plaintiff (A.186a).

APPENDIX "E"

Opinion of the District Court [October 15, 1968](A. 144)

THE COURT: I have devoted several hours to this motion, and the various documents. I read them and I had to re-read them to clarify myself on it.

I am of the opinion that this case should be dismissed for failure to allege damages adequately in the first instance, either to the stockholders or to the corporation, to specifically set it out.

I am also of the opinion they did not exhaust their remedies that should have been exhausted. I have in mind counsel's explanation of it, but I am still of the opinion that they had an obligation, this plaintiff did.

I think, furthermore, that he is in a different class from the other stockholders. I think he is not entitled to represent this class of stockholders what he purports to. Then, above all, this whole matter has been before the stockholders in this matter and they have had full knowledge of it. Their action, by more than 80 percent of those voting, convinces me this cause should be dismissed.

* * *

APPENDIX "F"

UNITED STATES DISTRICT COURT
for the
Northern District of Illinois
Eastern Division

No. 67 C 1790

MAURICE H. SCHY,

Plaintiff,

v.

THE SUSQUEHANNA CORPORATION, a Delaware corporation, SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSEN, D. W. REEVES, R. C. SCHENK, and N. F. TISDALE, JR.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came before the Court on motion by Defendants for an order that the action cannot be maintained as a class action, and also a motion by Defendants to dismiss the Complaint. Memoranda, together with exhibits, were filed in support of the Defendants' motions and in opposition thereto. The Court heard oral argument on October 12, 1968. At the oral argument Defendants submitted certain material in support of their motion to dismiss, marked as Defendants' Exhibit 1.

Based on the foregoing, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff Maurice H. Schy ("Plaintiff") is the holder of 100 shares of the common stock of Defendant The Susquehanna Corporation ("Susquehanna"). [A-174] The individual Defendants are two former officers and directors of Susquehanna and seven present officers and directors of Susquehanna, including Herbert F. Korholz, its President and a member of the Board of Directors (Korholz). One Defendant, Norman F. Tisdale, Jr., did not become a director until May 18, 1967.

2. On March 29, 1967, the individual Defendants (except Tisdale) distributed proxy material in which the Board of Directors of Susquehanna recommended that the stockholders approve an amendment to the Certificate of Incorporation authorizing three million shares of voting preferred stock. At that time the Certificate of Incorporation authorized only common stock, not preferred.

3. At the annual meeting of Susquehanna stockholders held April 21, 1967, the stockholders approved the adoption of an amendment to Susquehanna's Certificate of Incorporation by which a class of 3,000,000 shares of voting preferred stock was authorized by the affirmative vote of 72% of the shares entitled to vote, with 2.5% of the shares so entitled voting in the negative.

4. Early in August 1967 it became public knowledge that the Board of Directors of Atlantic Research Corporation ("Atlantic Research") had recommended to their stockholders the approval of a merger proposal made by Susquehanna.

5. The Complaint herein was filed on October 18, 1967. Plaintiff therein alleged that he brought the action "for himself and on behalf of [A-175] the other shareholders of Susquehanna situated similarly with Plaintiff." The class consists of approximately 9,000 stockholders. The Complaint prayed that Susquehanna be enjoined from calling a special meeting of the stockholders of Susquehanna for the purpose of submitting to the stockholders for their approval the proposed merger with Atlantic Research, which involved the issuance of the voting preferred stock. The Complaint, in essence, sought to prevent the proposed Susquehanna-Atlantic Research merger, and the Court understands that, if Plaintiff's demand for injunctive relief is now pressed, such requested relief would result in a setting aside of that merger.

6. On October 26, 1967, the Boards of Directors of Susquehanna and Atlantic Research distributed a Joint Proxy Statement which stated, in part:

> "The Board of Directors, at its meeting on March 13, [1967] adopted a resolution by which the Certificate of Incorporation of the Corporation would be amended to authorize the issuance of an additional class of 3,000,000 shares of voting preferred stock with a par value of $5 per share. This class of preferred stock will be in addition to the presently authorized class of $1 par value stock, of which 5,000,000 shares are authorized and 3,287,804 are outstanding and entitled to vote. The authorization of the class of preferred stock will not in any way affect the presently authorized class of $1 par value stock,

except that the $1 par value stock will, after approval of the amendment, be described as $1 par value common stock.

"The Board has declared the advisability of this amendment and has directed that it be submitted to the stockholders at the annual meeting. A copy of the resolution setting forth the amendment as adopted by the Board of Directors is attached as Exhibit A to this Proxy [A-176] Statement. Under Delaware law such an amendment must be approved by a majority of the outstanding shares of the Corporation entitled to vote at the meeting.

"Management recommends the approval of this amendment. The existence of a class of 3,000,000 voting shares of preferred stock will provide the Corporation with a greater flexibility of action in the event that opportunities for expansion arise. Management believes that the Corporation should be in a position to tailor the terms of the preferred stock to market requirements whenever a favorable acquisition develops or a need for capital exists because of internal growth of the Corporation. Accordingly, the Board of Directors has been given authority to determine all provisions of the preferred stock other than its voting rights and its par value.

"Under Delaware law, the Board of Directors has authority to issue all or any part of the authorized but unissued stock of the Corpora-

tion. The Certificate of Incorporation does not reserve preemptive rights to stockholders with respect to the existing $1 par value stock, nor will it as to the $5 par value preferred stock. If the proposed amendment is approved, the Board of Directors will have authority to issue amounts of the new $5 par value preferred stock, as well as additional amounts of the $1 par value common stock, without further action by the stockholders. Management has no present plan to issue any shares of the existing $1 par value stock, or if the authorization of the proposed $5 par value preferred stock is approved, to issue any shares of that class. However, Management anticipates that stock of either class might be issued as part of the consideration paid by the Corporation upon a future acquisition or merger."

7. Attached to the Proxy Statement dated March 29, 1967 as Exhibit A was a copy of a resolution of the Board of Directors of Susquehanna adopted on March 13, 1967. The resolution proposed that Article fourth of the Certificate of Incorporation be amended to read:

[A-177] "FOURTH . . . Without limitation on the generality of the foregoing, such Preferred Stock, and any class or series thereof, may be made subject to redemption at such time or times and at such price or prices, may be made convertible into, or exchangeable for, shares of any other class or classes or of any other series of any class of stock of the Corpora-

tion at such price or prices or at such rates of exchange and with such adjustments, and shall be subject to such provisions as to reissue upon redemption or purchase by or surrender to the Corporation, including the prohibition thereof, as shall be stated and expressed in the resolution or resolutions adopted by the Board of Directors providing for the issue of such Preferred Stock and of any class or series thereof; and further, each holder of such Preferred Stock and of any class or series thereof, shall be entitled to receive dividends at such rates, on such conditions, with such preferences (whether cumulative or noncumulative) and at such times, and to have such rights upon the dissolution of, or upon any distribution of the assets of, the Corporation, as shall also be stated and expressed in the said resolution or resolutions adopted by the Board of Directors as aforesaid."

8. The Joint Proxy Statement dated October 26, 1967, informed Susquehanna stockholders fully as to the contentions made and relief requested by Plaintiff in his Complaint herein. The Joint Proxy Statement at page 36 stated as follows concerning the Complaint:

"On October 19, 1967, Maurice H. Schy, a plaintiff in two of the above described actions, *Dasho, et al.* v. *Susquehanna, et al.*, No. 65-C-1757 in the United States District Court for the Northern District of Illinois, and the *Dasho* case pending in the Illinois state court, filed another suit in the United States District Court for the

Northern District of Illinois, Eastern Division, Civil Action No. 67-C-1790, against Susquehanna, its eight present directors, and one former director. Plaintiff alleged that the individual defendants caused Susquehanna on March 29, 1967, to distribute, in violation of the Securities Exchange Act of 1934, a "deceitful and misleading" proxy statement which solicited the proxies of common stockholders of Susquehanna for the amendment [A-178] of its Certificate of Incorporation to authorize the issuance of 3,000,000 shares of preferred stock with a par value of $5 per share. The 3,000,000 shares include the Class A Cumulative Convertible Preferred Stock to be exchanged for Atlantic Research common stock under the terms of the proposed merger.

"Plaintiff claims that the proxy material distributed March 29, 1967, was false and deficient in failing to disclose the following alleged facts; that prior to December 6, 1966, the defendants had resolved to merge Atlantic Research into Susquehanna by exchanging Susquehanna preferred stock, not then in existence, for Atlantic Research common stock; that merger negotiations with Atlantic Research had been initiated and were continuing on March 29, 1967; that in December, 1966, Defendant H. F. Korholz, Chairman of the Board of Directors of Susquehanna, had entered into two agreements with Dr. Arch C. Scurlock, a director of Atlantic Research, relating to this proposed merger; that Mr. Korholz acquired contract rights to pur-

chase Atlantic Research shares held by Television-Electronics Fund, Inc., and Susquehanna purchased Atlantic Research shares from Axe-Houghton Funds, Inc., as part of the proposed Atlantic Research—Susquehanna merger; that, during the period of merger negotiations with Atlantic Research prior to March 29, 1967, merger negotiations also were being conducted with Xebec Corporation; that the 3,000,000 shares of preferred stock were intended to be used in both such proposed mergers; that the preferences of such preferred stock would materially impair the equity position of the common stockholders of Susquehanna; and that, had the common stockholders been fully informed concerning the foregoing alleged facts, the amendment to the Susquehanna Certificate of Incorporation authorizing the issuance of 3,000,000 shares of preferred stock would not have been approved.

"Plaintiff prays that all the proxies solicited and received by Susquehanna Management, and voted at the annual meeting of stockholders on April 21, 1967, be held void; that less than a majority of the outstanding common stock of Susquehanna be held to have been represented at that annual meeting; that Susquehanna be enjoined from issuing any of the 3,000,000 preferred shares and be required to rescind the authorization for such shares; that Susquehanna be enjoined from calling a stockholders' meeting to vote on the proposed Susquehanna-Atlantic

Research merger; and that judgment be entered for the Plaintiff's costs, expenses, and attorneys' fees. Based upon the facts presently within their knowledge, it is the opinion of counsel for Susquehanna that the *Schy* suit is without merit."

[A-179] 9. The Joint Proxy Statement (pages 5, 7 and 8) also informed the stockholders that 1,970,449 shares of the new preferred stock, designated Class A Cumulative Convertible Preferred Stock, were to be exchanged for Atlantic Research common stock to effect the merger. The principal terms of the Class A Preferred also were set forth, including dividend rights, liquidation rights, and redemption provisions. The Joint Proxy Statement contained a resolution of the Board of Directors setting forth the rights and preferences of the Class A Preferred Stock (Exhibit I, page 27), and described the voting and liquidation rights of the common stock (pages 8-9).

10. The Joint Proxy Statement thus detailed the proposed merger, including the use of Susquehanna voting preferred stock to be exchanged for common stock of Atlantic Research. The litigation section of the Joint Proxy Statement contained a complete thumbnail sketch of the Complaint herein, including the relief requested. The Susquehanna stockholders thus were fully informed concerning Plaintiff's contentions and his prayers for relief.

11. At the Susquehanna stockholders meeting on November 27, 1967, 80.8% of the outstanding stock was voted in favor of the merger (99.5% of those voting), and 0.42% was voted against the merger. The merger with Atlantic Research was effected on December 4, 1967.

[A-180] 12. In connection with that merger, 1,970,449 shares of Susquehanna Class A preferred stock were promptly issued in exchange for an equivalent number of shares of Atlantic Research common stock. Such Class A shares have been registered and traded on the American Stock Exchange since December 18, 1967. In April 1968, a merger was effected between Xebec Corporation and Susquehanna, and approximately 450,000 shares of Susquehanna common stock were issued in exchange for Xebec common stock. In August 1968, Susquehanna issued to approximately 1,000 purchasers convertible debentures in the face amount of $22,500,000. These debentures are convertible into common stock, at a specified rate.

13. The Complaint did not allege monetary damage to Susquehanna or its common stockholders. A motion for summary judgment filed by Plaintiff November 26, 1967, was withdrawn as moot April 26, 1968. A second motion for summary judgment was filed October 10, 1968, and *for the first time Plaintiff* specifically claimed monetary damages.

14. No damage to Susquehanna or its common stockholders appears of record in this case. That the Susquehanna stockholders exercised a sound, as well as informed, business judgment in approving the merger between Susquehanna and Atlantic Research is shown by the uncontradicted evidence [A-181] concerning the corporate health and strength of Susquehanna as reflected by the increased size of its assets and the increased market valuation of its stock, as follows:

	Susquehanna After Gypsum Merger 12/31/66	Susquehanna After Atlantic Merger 12/31/67	Six Months Period Susquehanna After Atlantic Merger 6/30/68(1)
Sales	$32,687,079	$111,079,141	$ 69,916,000
Operating Income	3,080,105	9,795,117	6,691,000
Net Profit	3,952,953	6,869,161	6,551,000
Net Worth	35,725,970	42,353,631	51,125,000
Total Assets	40,513,325	91,718,736	100,581,000
Shares Outstanding	3,331,201	3,371,222	3,830,521(2)
Earnings Per Share	$1.19	$1.53(3)	$1.50(3)
Stock Price	6-5/8 - 7-7/8 Low Bid High Asked	50-5/8 - 75 American Stock Exchange	66-1/1 - 49-1/2 American Stock Exchange

(1) Includes data arising from merger of Xebec Corporation into Susquehanna in April 1968.

(2) Average common shares outstanding.

(3) Applicable to common stock after deducting preferred dividends.

15. Plaintiff has purchased and sold Susquehanna stock since 1964, with an aggregate profit of over $10,000. On March 29, 1967, Susquehanna [A-182] stock was quoted in the over-the-counter market at 13⅛ bid, 13½ asked. On April 21, 1967 the stock was quoted at 13¼ bid and 13-5 8 asked. In April 1967 Plaintiff owned 900 shares. On April 24, 1967 he sold 500 shares at $12.80 per share. On August 3, 1967, when it became generally known that the Atlantic Research Board of Directors had approved a merger with Susquehanna, Susquehanna stock sold at approximately $34 a share. On October 10, 1967, Plaintiff sold 300 shares of his Susquehanna stock at approximately $45.29 per share. His profit on these 300 shares was approximately $9,500. Eight days later he filed the complaint herein.

16. Plaintiff knew before filing the instant action that the merger proposal was to be submitted to the

Susquehanna stockholders for approval. He made no effort to obtain redress within the corporation, by appeal to the Board of Directors or the stockholders, for the grievances he asserted. Under the Securities and Exchange Commission regulations Plaintiff was entitled to have his contentions submitted to the stockholders in the Joint Proxy Statement (Regulation 240, 14a-8, 19 F.R. 247). Plaintiff did not seek to take advantage of this procedure.

17. In an affidavit filed October 18, 1967, under General Rule 39, Plaintiff, an attorney, is stated to have arranged with counsel representing him to share in any attorney's fee to be allowed herein, on the basis that he helped to prepare the Complaint and that he was expected to perform legal services in connection with preparation of the case.

[A-183] 18. Plaintiff's interests in maintaining the litigation are adverse to those of the class he claims to represent. He stands in a separate class from them. One week before the suit was filed he profited personally from the rise in the price of Susquehanna common stock following announcement of the proposed merger. He seeks to benefit from the suit not only by obtaining attorney's fees but also by relief, if any, the Court might grant. This creates a conflict of interest.

19. Not a single stockholder has intervened or otherwise given any sign of support for Plaintiff's action.

20. To grant the relief prayed for in the Complaint would require a judicial undoing of the Susquehanna-Atlantic Research merger, with consequent ill effects on a great number of third parties who relied in good faith on the validity of the preferred stock and the effectiveness of the merger.

CONCLUSIONS OF LAW

1. The members of the class Plaintiff purports to represent have shown, by their vote to approve the Susquehanna-Atlantic merger and to reject the maintenance of Plaintiff's litigation, that they have repudiated Plaintiff's efforts to represent them. Plaintiff does not "fairly and adequately protect the interests" of the class, within the meaning of FRCP Rule 23(a)(4).

2. Plaintiff's interests in maintaining the litigation conflict with those of the members of the class he purports to represent, and hence |A-184| he does not fairly and adequately protect the interests of the class, under FRCP Rule 23(a)(4).

3. Because this class has exercised an informed business judgment concerning the conduct of Defendants complained of, with respect to the authorization and issuance of the preferred stock and its use in the Susquehanna-Atlantic Research merger, Plaintiff cannot "fairly and adequately protect the interests" of the class, within the meaning of FRCP Rule 23(a)(4).

4. Plaintiff's interests in maintaining the litigation are adverse to those of the class, and Plaintiff's claims are not "typical" of the claims of the class he purports to represent, within the meaning of FRCP Rule 23(a)(3).

5. For each of the reasons set forth in Conclusions 1-4, the action cannot be maintained as a class action.

6. Notice should not be directed to the approximately 9,000 members of the class, on the issue of repre-

sentation, assuming that such notice is authorized by FRCP Rule 23. The members of the class were afforded full notice by the Joint Proxy Statement dated October 26, 1967.

7. Plaintiff is estopped from maintaining this suit and seeking equitable relief.

8. No damage to Susquehanna or its common stockholders has been alleged in the pleadings or can be established on this record.

9. Plaintiff's cause of action, and the equitable relief requested, are moot.

[A-185] 10. The Complaint fails to state a claim upon which relief can be granted. FRCP Rule 12(b)(6).

11. For each of the reasons set forth in Conclusions 6 - 10, the action should be dismissed with prejudice.

12. Plaintiff's motion for summary judgment, filed herein five days prior to the oral argument scheduled on the instant motion of Defendants is moot.

/s/ J. S. Perry

Judge

DATED: Chicago, Illinois,
November 8, 1968.